IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

TUESDAY, THE TENTH DAY OF AUGUST
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE V.V.S.RAO

WRIT PETITION NOs: 10663, 11061, 11313 and 11314 of 2004

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(1) W.P.No.10663 of 2004

Between:

UNITECH-NCC JV, 41, Nagarjuna Hills, Panjagutta, Hyderabad.
Represented by its Power of Attorney Holder Mr. A.V. Narasimha Raju, S/o. Sri AVS Raju,
... PETITIONER

AND

1 National Highways Authority of India, Rep. by its General Manager (East-I), Dwaraka, Sector - 10, G-5 & 6, New Delhi.
2 The Project Director, National Highways Authority of India,
PIU, NHAI Enclave, Old Diary Farm Compound, Hanumanthawaka, Visakhapatnam.
3 The Team Leader/Engineer (AP-3) Sheladia-RITES (JV), NHAI Enclave, old Diary Farm Compound, Hanumanthawaka, Visakhapatnam.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ, order or a direction more particularly one in the nature of a writ of MANDAMUS declaring The Circular Nos. 49/2003, dated 26-06-2003, 57/2003, 25-9-2003 and 83/04 dated 20-5-2004 issued by the 1st Respondent, as contrary to the provisions of the contract, illegal, arbitrary, without authority and violation of the Principles of Natural Justice and consequentially set-a-side the said circulars to the extent of contract agreement of the petitioner.

Counsel for the Petitioner:MR.KANAKAMEDALA RAVINDRA KUMAR

Counsel for the Respondents 1and 2: MR. S.S.VARMA (ADDL CGSC)

Counsel for the Respondent No.3: M.V.Kini & Co.,Advocate.

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(2)WRIT PETITION NO : 11061 of 2004

Between:

M/s. Navayuga Engineering Company Ltd.,

having its Registered Office at Door No. 48-9-17, Dwarakanagar, Visakhapatnam-16, represented by its Resident Director

Mr. P.A. Venkateswaran, S/o. Late Sri. P.V.A. Subrahmanyam,

having office address as above

..... PETITIONER

AND

1 National Highways Authority of India (NHAI),

Rep. by the General Manager (East-I),

Dwaraka, Sector-10, G-5 & 6, New Delhi.

2 The Project Director, National Highways Authority of India,

PIU, NHAI Enclave, Old Diary Farm Compound,

Hanumanthavaka, Visakhapatnam.

3 Team Leader, CES-BECA-RITES, Having their Site Office

at 7-3-12/B(2), Gonti Street, One Way Traffic Road,

Srikakulam -532 001.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate Writ order or direction more particularly one in the nature of Mandamus declaring the actions of Respondents 1 to 3 in deciding to recover the escalation amount paid (which is under dispute), from the running bills the Petitioner, as being illegal, arbitrary and unconstitutional and consequently direct the Respondents 1 to 3 not to recover the same from the running bills pending resolution of the disputes through arbitration "during the course of work, as provided in the clause 67.3".

Counsel for the Petitioner:MR.SRINIVASA RAO BODDULURI

Counsel for the Respondent Nos.1 and 2: MR.S.S.VARMA (ADDL CGSC)

Counsel for the Respondent No.3: None appeared.

(3)WRIT PETITION NO : 11313 of 2004

Between:

M/s. IVRCL Infrastructures & Projects Ltd, M.22/3RT, Vijayanagar Colony, Hyderabad, rep. by its Managing Director.

..... PETITIONER

AND

National Highways Authority of India, G5 & G6, Sector-10, Dwaraka, New Delhi - 110 045, Rep. by its Chairman and Managing Director.

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction declaring the action of the respondent in discontinuing payment of amounts towards price adjustment on the permanent works executed by the petitioner in respect of contract dt. 11th June 2001 of Chennai, Kolkota NH-5, as illegal, arbitrary, irrational and contrary to terms of contract and consequently direct the respondent to allow price adjustment on all the said works.

Counsel for the Petitioner:MR.C.V.NAGARJUNA REDDY

Counsel for the Respondent: MR.S.S.VARMA (ADDL CGSC)

(4)WRIT PETITION NO : 11314 of 2004

Between:

M/s Skanska Cementation India Limited,

Apeejay House, Dinshaw Vachha Road, Mumbai
rep.by its Power of Attorney Holder Mr.Arun Shripad Bapat,

General Manager (Legal)

..... PETITIONER

AND

National Highways Authority of India, G5 & G6, Sector-10, Dwaraka,

New Delhi-110 045, rep.by its Chairman and Managing Director

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to

issue a Writ of Mandamus or any other appropriate Writ, Order or direction declaring the action of the respondent in discontinuing payment of amounts towards price adjustment on the permanent works executed by the petitioner in respect of contract dated 11th June 2001 of Chennai-Kolkata NH-5 as illegal, arbitrary, irrational and contrary to terms of contract and consequently direct the respondent to allow price adjustment on all the said works

Counsel for the Petitioner:MR.C.V.NAGARJUNA REDDY

Counsel for the Respondent: MR.S.S.VARMA (ADDL CGSC)

The Court at the admission stage made the following :

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NOs.10663, 11061, 11313 AND 11314 OF 2004

COMMON ORDER:

In all these Writ Petitions the petitioners challenge three circulars of National Highways Authority of India (NHAI). These are titled as “Policy Matters – Administration/Finance” and bear Nos.49/2003, dt.26.6.2003, 57/2003, dt.25.9.2003, and 83/2004, dt.20.5.2004. The purport of these Circulars in a nutshell is that all the petitioners shall not be entitled for extra payment under escalation clause of the agreement over and above the amount actually payable, and if any amount is already paid to the contractors, the same has to be recovered wherever such payment is not secured by bank guarantee issued by State Bank of India.

In connection with the National Project, known as Golden Quadrilateral Project of National Highway (NH) under Chennai – Kolkata Section, from Visakhapatnam to Srikakulam, forming part of NH-5 all the petitioners were given contracts for various stretches of the roads. The contract is governed by agreement entered into between the respondents and the respective petitioners. Except the petitioner in W.P.No.10663 of 2004, in other Writ Petitions, the petitioners have yet to complete the work. Be that as it is, the contract is governed by general conditions of contract and special/modified the terms of contract.

The core submission of the learned counsel for the petitioners is that as per Clause 70 of the contract between the petitioner and NHAI, the amount payable to the contractor is valued at base rates and prices shall be adjusted in respect of the rise or fall in the indexed cost of the labour, material and other inputs to the works. By reason of the impugned circulars the respondents unilaterally changed the binding covenant in the contract, which is impermissible. They contend that NHAI being public authority constituted under Statute of Parliament, the action of the respondents in issuing the circulars purporting to amount unilateral covenants in the contract is illegal, arbitrary and violative of Article 14 of the Constitution of India. Learned counsel, however, neither dispute nor deny that the dispute in connection with or arising out of contract or execution of the works has to be resolved in accordance with the prescribed method of alternative disputes resolution. The same is provided for by Clause 67 of the contract, which deals with settlement of disputes. Inviting attention of this Court to this clause in the agreement, learned Standing Counsel for NHAI submits that the Writ Petitions are not maintainable and petitioners have to seek their remedy elsewhere.

As per Clause 67.1 of the contract, if the employer or contractor disagree with any action, inaction, opinion, instruction, determination, the matter has to be referred to a Disputes Review Board (DRB), which shall consists of three Members experienced with the type of construction involved in the works. Such DRB has to give its recommendation within fifty six days after receipt by the Chairman of the Board of the written request for recommendation. If any party is not satisfied with the recommendation of the DRB within twenty eight days after receipt of recommendation, or in case the DEB fails to give a recommendation within fifty six days time, then fourteen days after expiry of the period may have to give notice to other party of his intention to commence arbitration.

Under Clause 67.3 of the contract, the dispute thereafter has to be resolved/settled by arbitration in accordance with provisions of Arbitration and Conciliation Act, 1996.

At the second stage of dispute resolution, each party shall be entitled to appoint one arbitrator, and third arbitrator shall be chosen by the two arbitrators appointed by the parties. In view of the procedure adumbrated in the binding contract between petitioners and respondents, as rightly submitted by the learned Standing Counsel for respondents, this Writ Petition cannot be entertained, especially when there are disputed questions of fact with regard to the escalation of prices in execution of the works.

Insofar as the submission that the action of the respondents is arbitrary in denying the benefit of escalation under Clause 70 of the contract is concerned, the same is left open to the petitioners to raise the same before arbitral Tribunal as and when the same is constituted. The petitioners are given liberty to approach the first respondent for constitution of DRB. As and when such reference is sought by the petitioners, first respondent shall constitute the DRB within a period of two weeks thereafter. The parties to the Writ Petitions shall thereafter follow the procedure contemplated under clauses 67.1 and 67.3. In this Writ Petition, petitioners cannot seek any relief as prayed for. Insofar as the recoveries which the petitioners apprehend would be made, it is open to them to approach the first respondent, who shall take a decision keeping in view the observations hereinabove.

The Writ Petitions, with the above observations, are accordingly disposed of. No costs.

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(V.V.S.RAO, J)

10.8.2004

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ASSISTANT REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1. The General Manager (East-I), National Highways Authority of India, Dwaraka, Sector - 10, G-5 & 6, New Delhi.

2. The Chairman and Managing Director, National Highways Authority of India, G5 & G6, Sector-10, Dwaraka, New Delhi - 110 045

3. The Project Director, National Highways Authority of India,
PIU, NHAI Enclave, Old Diary Farm Compound, Hanumanthawaka, Visakhapatnam.

4 The Team Leader/Engineer (AP-3) Sheladia-RITES (JV), NHAI Enclave, Old Diary Farm Compound, Hanumanthawaka, Visakhapatnam.

5 Team Leader, CES-BECA-RITES, Site Office,

7-3-12/B(2), Gonti Street, One Way Traffic Road,

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